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No. 91-1538

In The

Supreme Court of the United States

October Term, 1991

SANDRA JEAN SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED FOR REVIEW

Is Antarctica a "foreign country" for the purposes of the Federal Tort Claims Act?

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PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit of December 24, 1991, *Smith* v. *United States*, slip op. 16931 (9th Cir. Dec. 24, 1991), including the dissenting opinion of Judge Fletcher, is reported

at 953 F.2d 1116 (9th Cir. 1991), and is reprinted in the Appendix to the Petition for Certiorari ("Pet.App."), at 1.

The opinion and judgment of the U.S. District Court for the District of Oregon, Judge Frye, presiding, of January 6, 1989, was reported at 702 F. Supp. 1480 (D. Or. 1989), and is reprinted in Pet.App. 18.

STATEMENT OF JURISDICTION

Petitioner has been granted review from the opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit of December 24, 1991. A Petition for Rehearing and Suggestion for Rehearing En Banc were both denied on that same date. *Smith* v. *United States*, 953 F.2d 1116, slip op. at 16933 (9th Cir. Dec. 24, 1991); Pet.App. 3. This Court granted the Petition for Certiorari on June 15, 1992. The Supreme Court has jurisdiction to review cases from the federal Courts of Appeals by virtue of 28 U.S.C. § 1254(1) (1988).

STATUTE INVOLVED

The Federal Tort Claims Act, June 25, 1948, ch. 646, § 1346, 62 Stat. 933 (1948) (codified as amended at 28 U.S.C. § 1346(b) (1988)), excludes from its jurisdiction "[a]ny claim arising in a foreign country." *Id.* § 2680 (codified at 28 U.S.C. § 2680(k) (1988)).

STATEMENT OF THE CASE

A. The Facts

The Petitioner, Sandra Jean Smith, is the widow of John Emmett Smith, and the duly appointed representative of his estate. *See* Exhibit A of Agreed Facts ("Agreed Facts"), *Smith* v. *United States*, 702 F.Supp. 1480, 1483 (D. Or. 1989), at ¶ 2; Pet.App. 26. Mr. Smith was a carpenter by trade, and was employed by ITT Antarctic Services, a firm which provides logistic support for U.S. operations in the Antarctic. Mr. Smith arrived at McMurdo Station, Antarctica, on October 27, 1986, and began work in building some structures at the Station, which is exclusively operated by the United States government. *Id.* ¶¶ 7, 9, 12, 15-22; Pet.App. 27-29.

On November 23, 1986, Mr. Smith and two companions took a recreational hike to a site near McMurdo Station. The party wandered off a marked route. Mr. Smith fell into a crevasse and was killed. *Id.* ¶¶ 29-45; Pet.App. 30-33.

B. The Geographic and Political Setting

Antarctica is, quite literally, the last place on earth. Constituting about ten percent of the world's land and water area, the Antarctic region is a great wilderness -- remote, desolate, sublimely beautiful, and implacably hostile to the very limited human activities there.[1] Antarctica is,

[1] The Antarctic land mass of approximately 13.5 million square miles is mostly covered by an ice sheet up to more than two miles thick. Less (continued...)

nonetheless, vitally significant as the climatological engine for global weather patterns, as an extraordinarily diverse ecosystem (on the coast and in the Antarctic (or Southern) Ocean), and as a platform for important physical and biological research.

The hallmark of United States policy towards the Antarctic has been to maintain it as a place for science. To this end, the United States has led in the development of the Antarctic treaty régime, which currently regulates virtually every aspect of the human presence on the Southern continent. The cornerstone of this system is the Antarctic Treaty, signed at Washington, on December 1, 1959. *See* 12 U.S.T. 795, T.I.A.S. No. 4780, 402 U.N.T.S. 71 (entered into force June 23, 1961) (hereinafter "Antarctic Treaty"). Provisions of the Antarctic Treaty will be referred to in detail in this brief, but it is helpful to recall here that the purpose of the Treaty is to ensure that the Antarctic region will be "used exclusively for peaceful purposes." *Id.* preamble cl. 1; art. 1, para. 1. The Treaty guarantees and promotes international scientific cooperation, *id.* arts. 2 & 3, requires the total demilitarization of the area, *id.* arts. 1 & 5, and allows complete freedom of movement in the region and the right of nationals of one country to visit the stations and installations of other countries. *Id.* arts. 7 & 8.

The Antarctic Treaty of 1959 has since been supplemented by various other conventions, protocols, and recommendations. These cover such matters as

[1](...continued)
than two percent of the land is exposed. *See generally*, U.S. Congress, Office of Technology Assessment (OTA), *Polar Prospects: A Minerals Treaty for Antarctica* (1989).

comprehensive environmental protection,[2] facilitating logistical support for scientific bases,[3] promoting exchanges of scientific information,[4] and even coordination of postal services.[5] The entire thrust of the Antarctic legal régime, and of the United States policy that supports it, is to promote science and research in the Antarctic region without concern for territorial claims or sovereignty.

To this end, the United States has maintained an extraordinary presence in the Antarctic. Yankee sealers were likely among the first to sight, and then land upon, the Southern continent. Admiral Richard E. Byrd's five expeditions to Antarctica (between 1928 and 1958) had mapped nearly eighty percent of the continent. *See* OTA, *Polar Prospects*, at 38-40. These efforts culminated in the International Geophysical Year (1957-58), marking the beginning of planned, international scientific cooperation in the region, and which, in turn, impelled the negotiation and

[2] *See* Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, ATCP Doc. XI ATSCM/2, reprinted in 30 *Int'l Legal Materials ("I.L.M.")* 1461 (1991), and 4 *Geo. Int'l Env'tal L. Rev.* 111 (1991).

[3] Antarctic Treaty Consultative Parties, Recommendations I-X (July 24, 1961) (reaffirming "traditional Antarctic principle . . . to render all assistance feasible in the event of an emergency"), XIII-6 (Aug. 6, 1986) (regarding siting of stations), reprinted in 1 W. M. Bush, *Antarctica and International Law* 126 and 91-2 *id.* Release (Booklet AT2), at 49.

[4] *See id.* Recommendation VIII-6 (June 20, 1975) (annual exchanges of information), reprinted in 1 W. M. Bush, *Antarctica and International Law* 317.

[5] *See id.* Recommendation I-XII (July 24, 1961), reprinted in 1 W. M. Bush, *Antarctica and International Law* 127.

signing of the Antarctic Treaty.

Some twenty-two nations today participate in Antarctic science. The United States currently operates three year-round stations: McMurdo, Palmer, and Amundsen-Scott (at the geographic South Pole), with a combined population of over 1400. In addition, the United States maintains a few summer stations (Byrd and Siple), with about 60 personnel. *Id.* at 143-45. All told, United States nationals account for over half of all Antarctic summer residents.[6] The United States' Antarctic presence is coordinated by the National Science Foundation (NSF), with logistical support provided largely by the U.S. Navy. *See, e.g.*, Antarctic Conservation Act of 1978, 16 U.S.C. §§ 2402(4), 2405 (1988) (recognizing lead role of NSF in environmental permitting and regulation).

C. Prior Proceedings

The gravamen of Petitioner's suit against the United States, filed in the U.S. District Court in Portland, Oregon, on August 5, 1987, is that its agents, the civilian and military authorities which operate the McMurdo Station, failed to warn Mr. Smith of the dangers in deviating from flagged routes in any off-base travel. *Smith* v. *United States*, 702 F.Supp. 1480, 1481 (D. Or. 1989); Pet.App. 18-19.

The District Court, Frye, J., presiding, granted the United States' motion to dismiss the action on the ground that the court lacked subject matter jurisdiction under the Federal Tort Claims Act. 702 F. Supp. at 1482-83; Pet.App. 25-26. The U.S. Court of Appeals for the Ninth Circuit affirmed. *Smith* v. *United States*, 953 F.2d 1116, slip op. 16931, at 16940 (9th Cir. Dec. 24, 1991); Pet.App. 10.

This Court granted the Petition for Certiorari on June 15, 1992.

[6] See *Environmental Impacts of U.S. Activities in Antarctica: Hearings on H.R. 3977, 4210 & 4514, before the Subcomms. on Coast Guard and Navigation, Fisheries and Wildlife Conservation and the Environment, and Oceanography and Great Lakes of the House Comm. on Merchant Marine and Fisheries*, 101st Cong., 2d Sess. 89, 92 (1990) (testimony of Bruce S. Manheim, Jr., Esq.).

SUMMARY OF THE ARGUMENT

This case presents the first opportunity for this Court to pass on the legal consequences of the activities of the United States in Antarctica. At issue here is the proper construction of the "foreign country" exception to the Federal Tort Claims Act (FTCA). The court of appeals ruled that Antarctica was a "foreign country" under the FTCA, thus barring Mrs. Smith's claim against the government for the wrongful death of her husband.

Petitioner submits that the phrase "foreign country" is not self-defining, but, rather, depends on the primary Congressional intent of insulating the United States from liability as imposed by foreign law. Antarctica is a sovereignless region under international law (to which the United States subscribes). It is a *terra nullius* belonging to no nation. A place without a sovereign can have no civil tort law of its own, and, therefore, the legislative goal of the FTCA's "foreign country" exception is not compromised by permitting claims to arise from Antarctica.

Sound policy is, moreover, served by allowing FTCA claims from the Southern continent. Since United States law does not otherwise treat citizens in the Antarctic as being in

a foreign country, it makes little sense to refuse their FTCA claims for that reason alone. The United States taxes citizens in Antarctica as if they were in the United States. It also exercises criminal jurisdiction over Americans there. If the United States taxes and punishes in the Antarctic, it is only right to construe the FTCA so as to allow claims when the government is negligent there. This result serves the interests of civilian scientists present in the Antarctic, the goal of free and unimpeded science being the cornerstone of U.S. polar policy.

By interpreting the FTCA to permit Antarctic claims, no violence is done to the choice of law and venue clauses of the Act, as the court below feared. Petitioner maintains that far from being intractable, the choice of law question raised in an FTCA claim, brought by a U.S. resident injured in the Antarctic, is straightforward. The law of the forum (typically the plaintiff's state of residence) would apply. This simple rule of decision reconciles the various provisions of the FTCA, while also remaining true to Congress's intent for the "foreign country" exception and the international legal status of Antarctica.

ARGUMENT

I.
ANTARCTICA IS NOT A "FOREIGN COUNTRY" FOR THE PURPOSES OF THE FEDERAL TORT CLAIMS ACT BECAUSE IT IS SOVEREIGNLESS AND HAS NO TORT LAW OF ITS OWN.

The Federal Tort Claims Act, June 25, 1948, ch. 646, § 1346, 62 Stat. 933 (1948) (codified as amended at 28 U.S.C. § 1346(b) (1988)) (hereinafter "the Act" or "FTCA"), excludes from its jurisdiction "[a]ny claim arising in a foreign country." *Id.* § 2680 (codified at 28 U.S.C. § 2680(k) (1988)). Nowhere in the Act, however, is the phrase "foreign country" defined.

The U.S. Court of Appeals held in the decision below, *Smith* v. *United States*, 953 F.2d 1116, slip op. 16931 (9th Cir. Dec. 24, 1991), that the United States has not waived immunity from suits brought for the government's acts or omissions in the Antarctic. *Id.* at 1117, 1120; slip op. at 16934, 16940; Pet.App. 4, 10. The Court of Appeals concluded that Antarctica is a "foreign country" for the purposes of the Federal Tort Claims Act, 28 U.S.C. § 2680(k), the sole avenue by which the Petitioner may sue the United States for the wrongful death of her husband. Petitioner submits that the reasoning adopted by the Ninth Circuit defies precedent, perverts the clear language of the statute, and undermines the intent and purpose of the Federal Tort Claims Act.

A. "Foreign Country" is not a Generic Phrase in the FTCA.

1. The phrase "foreign country" recurs with startling regularity in the Acts of Congress. And, despite pronouncements to the contrary,[7] it has defied ready definition. Instead, as has been noted by this Court, "[t]he term 'foreign country' is not a technical or artificial one, and the sense in which it is used in a statute must be determined by reference to the purpose of the particular legislation." *Burnet* v. *Chicago Portrait Co.*, 285 U.S. 1, 5-6 (1932); *accord Straneri* v. *United States*, 77 F. Supp. 240, 241 (E.D. Pa. 1948).

In *Burnet*, this Court confirmed that the word "country" in "foreign country" is capable of two meanings.[8] 285 U.S. at 5-6. It can mean any place beyond the sovereignty of the United States. Or, it can refer to a location under the sovereignty of a foreign nation. If, as in *Burnet*, the statute in question was the Internal Revenue Code,[9] and the primary design of the provision was to save Americans from double taxation, then income from a "foreign country" meant income earned in a place under a foreign sovereign (and, thus, under its taxing authority). *Id.* at 7.

2. Divining Congressional intent from patterns of statutory usages can hardly be conclusive in a case construing a *particular* law. Nonetheless, it seems that when Congress meant to strictly define "foreign country" as any locale beyond the sovereignty of the United States, it clearly said so. For example, in the Foreign Sovereign Immunities Act (FSIA), 90 Stat. 2892 (1976) (codified as amended at 28 U.S.C. §§ 1602-11 (1988)), the legislative twin of the FTCA,[10] "foreign state" is every place outside of the "United States," including "all territory and waters, continental or insular, subject to the jurisdiction of the United States." *Id.* §§ 1603 (a), (c). *See also* 18 U.S.C. § 1586 (1988) (punishing anyone who transports slaves from any "foreign country *or place* to another") (emphasis added).

Likewise, Congress has occasionally given "foreign country" a permissive meaning as any place under a foreign sovereign. *See, e.g.*, 18 U.S.C. § 1307(c)(2) (operation of State lotteries); and Tariff Act of 1930, 46 Stat. 701, 702 (1930), codified as amended at 19 U.S.C. § 1336(h)(3) (1988) (both statutes provided that "The term 'foreign country' means any empire, country, dominion, colony or

[7] *See, e.g.*, *United States* v. *Spelar*, 338 U.S. 217, 219 (1949) ("We know of no more accurate phrase in common English usage than 'foreign country' . . . ."') (citing *De Lima* v. *Bidwell*, 182 U.S. 1 (1901), which also held "A foreign country was . . . one exclusively within the sovereignty of a foreign nation, and without the sovereignty of the United States." *Id.* at 180.).

[8] This had been previously suggested by Chief Justice Marshall riding circuit in *The ADVENTURE*, 1 F. Cas. 202, 204-05 (C.C.D. Va. 1812) (No. 93) (Marshall, Circuit Justice), *rev'd on other grounds*, 12 U.S. (8 Cranch) 221 (1814).

[9] The provisions construed in *Burnet* were sections 238 (a) and (e) of the 1921 Revenue Act, 42 Stat. 227, 258-59 (1921).

[10] The FSIA codified restrictive notions of sovereign immunity and granted jurisdiction over foreign states in specified circumstances, including some actions in tort. *See* 28 U.S.C. § 1605(a)(5) (for language that tracks the FTCA).

protectorate, or any subdivision or subdivisions thereof (other than the United States and its possessions)").[11]

The availability of alternative statutory formulations for "foreign country," and the fact that Congress has availed itself of the opportunity to more precisely define that phrase, suggest that the only permissible approach to construction is to look to the purpose and intent of the FTCA, in view of other relevant policy goals. By declining this approach, the court of appeals below indulged in an exercise of "mechanical jurisprudence," to use the words of Justice Frankfurter in the only other case this Court has heard concerning the FTCA's "foreign country" exception, *United States* v. *Spelar*, 338 U.S. 217, 223 (1949) (Frankfurter, J., concurring).

B. The FTCA's "Foreign Country" Exception was Intended Primarily to Insulate the United States from Liability Imposed by Foreign Law.

1. As with many such cases, legislative history is of precious little use in determining here whether Congress intended that claims arising from Antarctica be excluded by the FTCA. Despite twenty-eight years of legislative drafting,[12] the "foreign country" exception apparently

[11] *See also, Procter & Gamble Mfg. Co.* v. *United States*, 19 C.C.P.A. 415 (1932), *cert. denied*, 287 U.S. 629 (1932) (whale oil produced on Norwegian ship in Ross Sea (off the Antarctic coast) subject to United States customs duties, under 1930 Tariff Act, because it came from a foreign country; the fact that the vessel was of Norwegian registry was considered dispositive).

[12] The FTCA was the product of dissatisfaction with the old, cumbersome system of considering claims against the government through (continued...)

escaped close scrutiny. Those few occasions where Congress discussed that language were fairly inconclusive, but they do provide some hint, as this Court has already ruled in *Spelar*, about what was generally intended.

First, it was apparently *not* intended that the FTCA exclude outright the claims of foreign nationals. Language considered in 1942 by the House Judiciary Committee would have exempted "any claim arising in a foreign country in behalf of an alien." H.R. Rep. No. 5373, 77th Cong., 2d Sess., at § 303(12) (1942). This version would have "made the waiver of the Government's traditional immunity turn upon the fortuitous circumstance of the injured party's citizenship." *Spelar*, 338 U.S. at 220. The Attorney General objected to that language and the phrase "in behalf of an alien" was dropped. *See Hearings on H.R. 5373 and 6463*, 77th Cong., 2d Sess., at 29, 35, 66 (1942) (hereinafter "*1942 House Hearings*").

Second, it appears that Congress had earlier flirted with the idea of providing a more definite meaning of "foreign country," but ultimately chose not to do so. In 1940, language proposed by a government official to the Senate Judiciary Committee would have made the FTCA "applicable only to damage or injury occurring within the geographical limits of the United States, Alaska, Hawaii, Puerto Rico, or the Canal Zone." *See Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*,

[12](...continued)
a private bill procedure in Congress. *See Spelar*, 338 U.S. at 219-20. Petitioner concedes that without an express waiver of the Government's immunity from suit, an action against the United States is usually impossible. *See United States* v. *Orleans*, 425 U.S. 807, 814 (1976); *Dalehite* v. *United States*, 346 U.S. 15, 30-31 (1953).

76th Cong., 2d Sess. 65 (1940) (proposal by J.J. Keegan, member, U.S. Employees Compensation Comm'n). As has already been noted, *see Beattie* v. *United States*, 756 F.2d 91, 114-15 (D.C. Cir. 1984) (Scalia, J., dissenting), this proposal was never acted upon by the Senate Judiciary Committee. This implies, at least, that Congress was cognizant of alternative formulations but chose to permit FTCA claims arising outside of United States' territory (as long as they were not from a place under a foreign sovereign).

One remaining piece of the legislative history is significant and telling, as this Court realized in *Spelar*. This was the 1942 testimony of Assistant Attorney General Shea, speaking in favor of the draft "foreign country" exception (the one that had dropped the language barring claims of aliens). He said:

> "[c]laims arising in a foreign country have been exempted . . . whether or not the claimant is an alien. Since liability is to be determined by the law of the situs of the wrongful act or omission it is wise to restrict the bill to claims arising in this country. This seems desirable because the law of the particular State is being applied. Otherwise, it will lead I think to a good deal of difficulty."

1942 House Hearings, at 35 (testimony of Asst. Att'y Gen. Shea). *See id.* at 66 (comments on bill) ("Claims arising in a foreign country have been exempted from the present bill, whether or not the claimant is an alien, since liability is to be determined by the law of the situs of the wrongful act or omission.").

The fair reading of these passages, as made by this Court in *Spelar*, is that Congress was "unwilling to subject the United States to liabilities depending upon the laws of a foreign power." 338 U.S. at 221. Assistant Attorney General Shea's concerns about the "foreign country" exception rested really with the choice of law rule embedded in the FTCA. *See* FTCA, June 25, 1948, ch. 646, § 1346, 62 Stat. 933 (1948) (codified as amended at 28 U.S.C. § 1346(b) (1988)) (the statute imposes liability "in accordance with the law of the place where the act or omission occurred"). In other words, the Court in *Spelar* recognized that a claim under the FTCA could arise outside of the territory of the United States, *provided* that the government's act or omission did not occur in a place where another nation's tort law was in force.

2. It is no surprise, therefore, that the Court in *Spelar* rejected the FTCA claim of an individual who was injured at the U.S. base at Harmon Field, Labrador, an area under a 99-year lease by Great Britain to the United States. *See* 338 U.S. at 217-18.[13] In *Spelar*, the Court followed an earlier decision which held that the United States had only limited control over areas under the lease. *Id.* at 218 (citing *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377 (1948) (considering the applicability of the Fair Labor Standards Act to American contractors engaged in construction of a military base at Bermuda, transferred in the same lease)). The Court

[13] The lease was effectuated by an executive agreement. *See* Agreement and Exchange of Letters Respecting Leased Naval and Air Bases, Mar. 27, 1941, U.K.-U.S., art. I, para. 1, 55 Stat. 1560, 1572, 1576, 1590, E.A.S. No. 235 ("The United States shall have all the rights, power and authority within the Leased Areas which are necessary for the establishment, use, operation and defence thereof, or appropriate for their control. . . .").

concluded that applying American tort law in such leaseholds would be an arrogation of authority under the lease agreement. *Id.* at 219. Thus, Newfoundland tort law continued to apply in the area, and the FTCA claim was rejected as "arising from a foreign country" where a foreign tort law was in force.

Many lower courts have faced the question of which locales are "foreign countries" for the purposes of the FTCA. Some have attempted to resolve the dilemma by determining, as in *Spelar*, whether a foreign tort law was in force in the area. *See, e.g.*, *Meredith* v. *United States*, 330 F.2d 9, 10 (9th Cir. 1964), *cert. denied*, 379 U.S. 867 (1964) (U.S. embassy at Bangkok would apply Thai tort law); *Gerritson* v. *Vance*, 488 F. Supp. 267, 268 (D. Mass. 1980) (embassy in Zambia); *Cobb* v. *United States*, 191 F.2d 604, 609-11 (9th Cir. 1951), *cert. denied*, 342 U.S. 913 (1952) (Okinawa, although occupied by the United States after Second World War, remained under Japanese sovereignty with Japanese law still in force); *Burna* v. *United States*, 240 F.2d 720 (4th Cir. 1957) (same). There has been substantial recognition, as a consequence, that Congress was chiefly preoccupied with preventing a foreign law from governing in a FTCA action.

3. Petitioner is mindful of the canon of statutory interpretation that U.S. laws should not be deemed to apply extraterritorially, "'unless a contrary intent appears'." *EEOC* v. *Arabian American Oil Co.*, 111 S.Ct. 1227, 1230 (1991) (quoting *Foley Bros. Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949)). But this Court went on to say in *Arabian American* that this rule of construction "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Id.* (citing *McCulloch* v. *Sociedad Nacional de Marineros de*

Honduras, 372 U.S. 10, 20-22 (1963)).[14] This merely confirms the proper scope of the inquiry in this case: if Antarctica is "sovereignless," and is without its own civil tort law to apply, then the FTCA's "foreign country" exception was not intended by Congress to bar a claim arising there.

C. Antarctica Belongs to No Sovereign and has no Tort Law of its Own.

1. The proposition that Antarctica is beyond the sovereignty of any nation is undisputed in this case. The court of appeals held below that "Antarctica [is] a sovereignless region without civil tort law." *Smith*, 953 F.2d at 1117; slip op. at 16934; Pet.App. 4. The foreign policy of the United States has been to deny recognition of any State's claim to territorial sovereignty in the Antarctic. *See Law of the Sea Negotiations: Hearings before the Subcomm. on Arms Control, Oceans, International Operations and Environment, of the Senate Comm. on Foreign Relations*, 97th Cong., 1st Sess. 24-25 (1981) (testimony of Ass't Sec. of State James L. Malone). This position is consistent with article IV of the 1959 Antarctic Treaty, which declares that

> "No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or

[14] *See also Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 291 (1952) (Reed, J., dissenting) (noting that presumption against a law's extraterritorial effect does not hold where the "statute is applied to acts committed by citizens in areas subject to the laws of no sovereign.") (citing *Skiriotes* v. *Florida*, 313 U.S. 69, 73 (1941), and *The HAMILTON*, 207 U.S. 398 (1907)).

> create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force."

Antarctic Treaty, art. IV, para. 2.[15]

The courts of this country are obliged to respect these pronouncements by the executive of what claims to territorial sovereignty are, or are not, to be recognized in Antarctica. *See United States* v. *Pink*, 315 U.S. 203, 229-30 (1942); *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 138 (1938) (both concerning status of Soviet Union prior to recognition); *Kennett* v. *Chambers*, 55 U.S. (14 How.) 38, 50-51 (1852) (status of Republic of Texas). Some jurists who have considered the applicability of the FTCA's "foreign country" exception in this context have said that the executive's determination -- that there is no foreign sovereign in Antarctica -- is "binding" on this issue. *See Beattie*, 756 F.2d at 108 (Scalia, J., dissenting). It is beyond peradventure, therefore, that Antarctica is sovereignless.

2. It follows that not only is Antarctica beyond the sovereignty of any nation (a *res nullius* in international law terms),[16] it also cannot have a civil tort law of its own.

[15] The United States currently has no claims staked on the Antarctic continent, although, conceivably, it could be in a position to make some, were the Antarctic Treaty to lapse. *See* Hayton, The "American" Antarctic, 50 *Am. J. Int'l L.* 583 (1956); Lissitzyn, The American Position on Outer Space and Antarctica, 53 *id.* 126, 128 (1959).

[16] *Terra nullius* are those areas, like the high seas and outer space, that "are free for the use . . . of all and [where] persons are not deprived (continued...)

Such a tort law could be imposed by those nations that purport to make a claim of territorial sovereignty to various "sectors" of the Antarctic land mass.[17] But, once again, the United States refuses to recognize such claims of territorial sovereignty, and also such corollary assertions of jurisdiction based on territorial claims.

Under this reading of the FTCA, and in view of the Congressional goal of insulating the United States from liability imposed by another nation's tort law, Antarctica cannot possibly be considered a "foreign country."

[16](...continued)
of the protection of the law merely because of the absence of state sovereignty." Ian Brownlie, *Principles of Public International Law* 177 (4th ed. 1990).

[17] For a review of the territorial claims made by seven States (Argentina, Australia, Chile, France, Great Britain, New Zealand, and Norway), at least up to the time they were "frozen" under the terms of article 4 of the Antarctic Treaty, *see* Hayton, The Antarctic Settlement of 1959, 54 *Am. J. Int'l L.* 349 (1960).

A sector is a pie-shaped wedge of territory, and all sector claims in the Antarctic intersect at the South Pole.

II.
NO POLICY IS SERVED BY BARRING FTCA CLAIMS FROM ANTARCTICA.

A. U.S. Law Does not Treat Citizens in the Antarctic as Being in a Foreign Country.

1. Although the United States rejects the assertion, by any State, of territorial sovereignty in the Antarctic, it does, however, recognize assertions of jurisdiction in Antarctica based on nationality. Obvious examples include the United States' own extension of jurisdiction over crimes committed by Americans in the Antarctic. When Congress extended the special maritime and territorial jurisdiction of the United States to "[a]ny place outside the jurisdiction of any nation with respect to an offence by or against a national of the United States," Act of Oct. 12, 1984, Pub. L. No. 98-473, title II, ch. 12, part H, § 10, 98 Stat. 2164 (codified at 18 U.S.C. § 7(7) (1988)), it clearly had incidents in Antarctica in mind. *See Extraterritorial Criminal Jurisdiction, 1977: Hearing on H.R. 763, 6148 & 7842 Before the Subcomm. on Immigration, Citizenship and International Law of the House Comm. of the Judiciary*, 95th Cong., 1st Sess. 31 (1977) (testimony of Robert L. Keuch, Dep. Ass't Att'y General) (legislation is required to cover crimes committed in remote and isolated environments, such as the Antarctic). Obviously, the United States does not recognize other

nations' criminal jurisdiction over Americans in Antarctica.[18]

Quite appropriately, the United States considers income earned by citizens in Antarctica as not being sourced to a foreign country, but, rather, subject to full taxation as if earned in the United States proper. Originally, this result was achieved through a judicial construction of the operative phrase "foreign country" in the relevant provision of the Internal Revenue Code, 26 U.S.C. §§ 911(a)(1), (b)(1)(A) (1988). The Tax Court, in *Martin* v. *C.I.R.*, 50 T.C. 59 (1968), held that Antarctica was not a "foreign country," and the taxpayer was fully assessed on his income earned there. This result was later codified into law. *See* 26 U.S.C. § 863(d)(2)(A) (1988); *see also Hearings on Tax Reform Act of 1986*, S. Rep. No. 313, 99th Cong., 2d Sess. 358 (1986).

2. Petitioner again recognizes that this consistent legislative practice -- of not treating Antarctica as a foreign country -- cannot be dispositive in a case construing the FTCA. Nonetheless, it is highly suggestive that Congress has recognized Antarctica's *terra nullius* character, and has sought to assimilate U.S. activities on the Southern continent to those on the high seas, that other great expanse of area beyond the jurisdiction of any nation. And, as Chief Justice

[18] Some nations purport to extend jurisdiction in the Antarctic based on claims of territorial sovereignty. As noted, *supra*, the United States does not recognize such assertions of jurisdiction. Other nations do exercise, through statutory enactment, sweeping jurisdiction over their own nationals in the Antarctic. This type of jurisdiction -- based on nationality -- the United States does recognize, as it is the same basis of our legislation over activities in Antarctica. *See, e.g.*, New Zealand's Antarctica Act 1960, No. 47, s. 3(1)(b), reprinted in 3 W.M. Bush, *Antarctica and International Law* 81; South African Citizens in Antarctica Act, 1962, No. 55, s. 2, reprinted in *id.* at 202.

Marshall noted in one of the first reported cases construing the meaning of the phrase "foreign country" (as it appeared in the Non-Intercourse Act, 2 Stat. 528 (1809)), "the sea is the common property of all nations. It belongs equally to all. None can appropriate it exclusively to themselves: nor is it 'foreign' to any." *The ADVENTURE*, 1 F. Cas. 202, 204-05 (C.C.D. Va. 1812) (No. 93) (Marshall, Circuit Justice), *rev'd on other grounds*, 12 U.S. (8 Cranch) 221 (1814).

When the FTCA is understood in light of those statutes waiving sovereign immunity for acts or omissions of the government on the high seas, the folly of considering Antarctica a "foreign country" is apparent. The FTCA excludes from its jurisdiction, *see* 28 U.S.C. § 2680(d) (1988), claims for which a remedy is provided by the Suits in Admiralty Act, ch. 95, § 5, 41 Stat. 526 (1920) (codified at 46 U.S.C. § 745 (1988)). The Suits in Admiralty Act would allow a claim against the United States for an action within the purview of a related piece of legislation, the Death on the High Seas Act ("DOHSA"), ch. 111, § 1, 41 Stat. 537 (1920) (codified at 46 U.S.C. § 761 (1988)). In other words, a wrongful death claim against the United States arising just *offshore* the McMurdo Station, on a frozen part of the Southern ocean, would be allowed to proceed. *See, e.g.*, *Roberts* v. *United States*, 498 F.2d 520, 526 (9th Cir. 1974) (representatives of those killed in air crash just a few thousand feet short of runway off Okinawa had claim under DOHSA through Suits in Admiralty Act, but not under FTCA because Okinawa was considered a "foreign country"), *cert. denied*, 419 U.S. 1070 (1979).

It defies reason to read the FTCA to bar a claim from one sovereignless region (the Antarctic land mass), while allowing an action in another region beyond any nation's sovereignty (the high seas), just because one place is land and

the other is water. DOHSA and the FTCA are meant to provide parallel remedies for persons injured by the government. It makes sense to consider Antarctica, the only land area on the globe which is *res nullius*, to be similar in legal character to the high seas and, thus, not a "foreign country."

B. The FTCA's Choice of Law and Venue Provisions are not Upset by Antarctic Claims.

1. As far as Petitioner can ascertain from the decision below, the primary reason that the court of appeals decided that Antarctica was a "foreign country" had nothing to do with the Congressional intent of that language, or the international legal status of Antarctica. Instead, the Ninth Circuit concluded that to allow claims to arise from Antarctica would cause insuperable choice of law difficulties under the FTCA. The court of appeals read the choice of law provision of the FTCA, 28 U.S.C. § 1346(b) (1988) (imposing liability on the government "in accordance with the law of the place where the act or omission occurred"), to indicate that Congress did not wish for the FTCA to apply to the Antarctic, which has no tort law of its own. *Smith*, 953 F.2d at 1119; slip op. at 16938; Pet.App. 8. But, as discussed *supra*, the "foreign country" exception was intended to prevent a suit arising from a place where a foreign tort law was in force. In other words, the situation presented here is "*directly opposite* to the [legislative] fear of becoming entangled in foreign law, which produced the 'foreign country' exception." *Beattie*, 756 F.2d at 105 (original emphasis).

The court of appeals failed to recognize that the FTCA requires that the whole law of the *lex loci delicti* be

applied, both its substantive tort provisions and its choice of law rules. This was the decision in *Richards* v. *United States*, 369 U.S. 1 (1962), which construed section 1346(b) of the FTCA. *Id.* at 13-14. The FTCA requires, therefore, that a court determine whether the choice of law rules embedded in the "law of the place where the act ... occurred" might not require that another jurisdiction's *substantive* law be applied. In conflicts parlance, this is known as renvoi.[19]

Federal courts have grown accustomed to renvoi in their search for the proper substantive tort law to apply in FTCA actions. *See, e.g.*, *Guillory* v. *United States*, 699 F.2d 781, 784-87 (5th Cir. 1983) (applying Louisiana law under choice of law rules of Texas, where negligence occurred); *Loge* v. *United States*, 662 F.2d 1268, 1273 (8th Cir. 1981) (applying Arkansas law under District of Columbia choice of law rules), *cert. denied*, 456 U.S. 944 (1982); *Hensley* v. *United States*, 728 F. Supp. 716, 721 (S.D. Fla. 1989) (applying Florida law under New York's choice of law rules). The vitality of the renvoi rule of *Richards*, necessitated by the very language and structure of the FTCA, is not questioned by Petitioner.

2. This Court might be justified in sharing the Ninth Circuit's concerns *if* a plaintiff were asking for a substantive tort law to be fashioned out of whole cloth for claims arising

[19] American conflicts jurisprudence adopted the French word (meaning "echo") for its rich connotation of a forum state's reference to another state's law, a process which causes the choice of law to "bounce back," like an echo off a wall. *See generally*, Eugene F. Scoles & Peter Hay, *Conflict of Laws* § 3.13 (1992).

exclusively in Antarctica.[20] As Judge Wald noted in *Beattie*, "the question here is not which substantive law will apply but which choice of law rule will apply." 756 F.2d at 139 (Wald, J., concurring). Petitioner submits that where the *lex loci deliciti* is a place not subject to any sovereign (and thus not having any tort law of its own), the law governing the action is that of the victim's domicile. This result is reached by one of two doctrinal paths: the traditional private international law of "personal sovereignty," and the modern, interest balancing approach encapsulated in section 6 of the Conflicts *Restatement*. Both roads, as will be traversed below, lead to the same place for this case. That is Oregon -- the law of the Petitioner's domicile and of the forum.

3. When an individual is injured in a land having no tort law of its own, courts will, instead, apply the law of that person. This "old notion of personal sovereignty," as Justice Holmes called it, *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 356 (1909) (Holmes, J.), is quite old, indeed. It was recognized in English law as early as 1774 in the case of *Mostyn* v. *Fabrigas*, 1 Cowp. 161, 181, 98 Eng. Rep. 1021, 1032 (K.B. 1774) (Mansfield, C.J.), and perhaps nearly a century before. *See Dutton* v. *Howell*, 1 Show. Parl. Cas. 24, 30, 1 Eng. Rep. 17, 21 (H.L. 1693). It was, of course, a convenient doctrine, allowing British subjects to avail themselves of their own courts in actions involving other Englishmen, even though those actions arose in places

[20] This case does not present the irksome problem of multiple claims and allegations of various places where governmental acts or omissions occurred. This was, in a real sense, the trouble with *Beattie*, where the New Zealand claimants alleged both the negligence of U.S. air traffic controllers at McMurdo, as well as a "headquarters claim" (in the District of Columbia) for the Navy's failure to properly train and supervise them. *See* 756 F.2d at 93.

not subject to any law (as long as those actions were not strictly local, such as questions involving title to land). *See, e.g.*, *British South Africa Co.* v. *Companhia de Mocambique*, [1893] App. Cas. 602, 605 (counsel's argument), 618-19 (Herschell, L.C.); *Hart* v. *Gumpach*, 4 L.R.-P.C. 439, 463-66 (1873) (Smith, J.). Over the years, as nations established themselves in every part of the habitable globe, the rationale for "personal sovereignty" lessened, and, today, of course, one would be hard-pressed to find any part of the temperate or tropical earth not having its own tort law. As recently as 1971, however, the House of Lords reaffirmed that if one Englishman wrongfully injures another in a "primitive or unsettled territory" where there is no law of torts, English law could be applied. *See Chaplin* v. *Boys*, [1971] App. Cas. 356, 396, 401 (Pearson, L.J.).

The teaching of these British authorities was recognized in two opinions of this Court, both by Justice Holmes. In *American Banana*, he wrote

> "No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such [civilized nations] may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive."

213 U.S. at 355-56. Two years earlier, in *The HAMILTON*, 207 U.S. 398 (1907), Justice Holmes averred to this point and said "the bare fact of the parties being outside the territory [of the United States] in a place belonging to no other sovereign would not limit the authority of the State, as accepted by civilized theory. No one doubts the power of England or France to govern their own ships upon the high seas." *Id.* at 403.

In the case at bar, there is, once again, no question that Antarctica has no sovereign and thus has no substantive tort law. Nor is there any question here that the decedent was a citizen of the United States and a resident of Oregon. Notwithstanding his foray to the Southern continent, he did not lose his status as an Oregon domiciliary; Antarctica having no sovereign, it obviously cannot have a *lex domicilii*. Where, as here, both parties are "citizens of the adjudicating forum," *Beattie*, 756 F.2d at 113 n.7 (Scalia, J., dissenting), the rule of personal sovereignty can be applied. Antarctica may be the last place on earth where this notion, repeatedly recognized in Anglo-American jurisprudence, can continue to have force. But that does not lessen its relevance here.

4. The D.C. Circuit, in *Beattie* (the only court that has grappled with the choice of law implications of an Antarctic claim), discussed the notion of personal sovereignty, 756 F.2d at 105, 141-42 (Wald, J., concurring), but placed somewhat greater emphasis on the balance of interest factors detailed in section six of the *Restatement (Second) of Conflict of Laws* (1971). This provision is intended to guide the choice of law decisions of adjudicating forums, and includes such elements as

> (a) the needs of the interstate and international systems;
> (b) the relevant policies of the forum;
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;
> (d) the protection of justified expectations;
> (e) the basic policies underlying the particular field of law;
> (f) certainty, predictability and uniformity of result; and,

(g) ease in the determination and application of the law to be applied.

Id. § 6.

In an FTCA claim arising from Antarctica, and featuring a resident of an American state as plaintiff, what would be weighed in the *Restatement* calculus are the interests of the American state forum against those of a putative Antarctic forum. It is not much of a contest. *See Beattie*, 756 F.2d at 105 ("Antarctica has no 'forum'"), 141 ("Antarctica has no law, consequently there is no conflict of law problem.") (Wald, J., concurring). Antarctica is an unformed entity and has no law, no forum, and no interest in the outcome of a suit against the United States government. The only conceivable interest of the Antarctic forum is the one held collectively by the parties to the Antarctic Treaty: that no exercise of jurisdiction purport to be a claim of territorial sovereignty. An FTCA claim, premised, as it must be, on the nationality of the defendant (the United States), would be completely in keeping with the terms of the Antarctic treaty régime.

On the other side of the ledger, the state of the plaintiff's residence (as well as the forum), has a substantial interest in applying its law to this case. This is the interest protected by the FTCA's choice of law command in section 1346(b). However arrived at, Oregon's substantive tort law would apply in this case.

5. The choice of law direction that Petitioner suggests here would satisfactorily handle any FTCA claim exclusively arising from a sovereignless locale, provided the forum was in the United States. This leads to the other reason voiced by the Ninth Circuit for disallowing FTCA claims from Antarctica. The court of appeals seized on the venue

provision of the FTCA, 28 U.S.C. § 1402(b) (1988) (laying venue in "the judicial district where the plaintiff resides or wherein the act or omission complained of occurred"), and concluded that

> "[w]hile Smith . . . is able to lay venue in her state of residence because it has a district court, venue would not exist if the plaintiff happened to reside outside the United States. If we were to find that Antarctica is not a foreign country, a resident of New Zealand, or of any other country, injured by the acts or omissions of a U.S. employee in Antarctica, would find sovereignty waived but no venue in which to proceed against the United States. It is unlikely that Congress intended to create a tort remedy in cases for which no venue exists."

Smith, 953 F.2d at 1118-19; slip op. at 16937-38; Pet.App. 7-8 (footnotes omitted).

Petitioner maintains that, on this point at least, the Ninth Circuit has seriously erred by fashioning a new, and utterly unsupportable, canon of statutory construction which would presume that where Congress gives a right of action, it also lays a venue. This Court has consistently ruled that there have always existed situations "in which the federal courts have jurisdiction but there is no district in which venue is proper." *Brunette Machine Works, Ltd.* v. *Kockum Industries, Inc.*, 406 U.S. 706, 710 n.8 (1972). While such gaps should be closed wherever possible, *id.*, that does not mean that a statute should be construed to *deny* jurisdiction for one claimant, just because a differently situated plaintiff might not find a proper venue.

6. Petitioner does note, though, that a consequence of the choice of law rule endorsed above is that a plaintiff who is not a resident of the United States could not bring an FTCA case if her claim arose *exclusively* in Antarctica.[21] In such a case, the hypothetical plaintiff would be asking a U.S. court to apply not the law of the forum, but the law of her foreign domicile. *This* is the result feared by the Ninth Circuit, although other courts have avoided this obvious trap and remained true to the underlying rationale of the FTCA's "foreign country" exception. *See, e.g.*, *Sami* v. *United States*, 617 F.2d 755, 763 (D.C. Cir. 1979) (rejecting possibility that West German law could be applied to a claim brought for false imprisonment); *Leaf* v. *United States*, 588 F.2d 733, 736 n.3 (9th Cir. 1978) (California law applied despite the fact that some claims also arose in Mexico).

But this concern -- that foreign law will enter an FTCA case by way of renvoi -- is not raised in this case. Nor would it be brought about by the result sought here: an American domiciliary will find a forum's law to apply when she lays her venue in her state of residence. A non-resident of the United States will be unable to find a venue if his case arose exclusively in Antarctica. This outcome is perfectly fair in view of the underlying purpose of the FTCA in preventing the application of foreign law.[22]

[21] In *Beattie*, of course, the New Zealand plaintiffs used their "headquarters claim" in the District of Columbia to bootstrap not only the choice of law analysis, but also the laying of a pendent venue for their Antarctic claim. *See* 756 F.2d at 100-06, 117-30 (Scalia, J., dissenting), 130-43 (Wald, J., concurring).

[22] As noted, *supra* at 13, Congress did reject one version of the FTCA that would have *categorically* denied the claims of aliens. The (continued...)

In this fashion, the "foreign country" exception of the FTCA, as well as its choice of law and venue clauses, are reconciled in a simple rule of decision. That holding is also in perfect harmony with the international legal status of Antarctica and the treatment given, by Congress, of the activities of Americans there.

[22](...continued)
result suggested by Petitioner does not seek to resurrect that language. Instead, the reason that a claim of a foreign resident (arising exclusively from Antarctica) would be barred is that the alien must, by necessity, invoke the law of his "personal sovereignty" or domicile, and that law would be foreign. *See Burna* v. *United States*, 240 F.2d 720, 722 (4th Cir. 1957) (recognizing this rationale in denying claim from Okinawa).

CONCLUSION

For the foregoing reasons, the judgment of the U.S. Court of Appeals for the Ninth Circuit ought to be REVERSED.

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